

FEDERAL COURT OF AUSTRALIA

Bozanich v Minister for Immigration & Multicultural Affairs [2002] FCA 81

MIGRATION – extended eligibility (temporary) (class TK subclass 820) spouse visa – whether Migration Review Tribunal in error of law in affirming decision of delegate refusing visa – whether Tribunal in error of law in concluding that there were no compelling reasons for not applying schedule 3 criteria

Migration Act 1958 (Cth) ss 31, 31(3), 359A, 366A, 424A, 476, 476(1)(a), 476(1)(d) and (g), 476(1)(e), 476(3)(c), 476(3)(d) and (e)
Migration Regulations 1994 regs 2.01, 2.02, 2.03

Minister for Immigration & Multicultural Affairs v Yusuf (2001) 180 ALR 1 cited
Minister for Immigration & Multicultural Affairs v Al Shamry [2001] FCA 919 referred to

MARIJA BOZANICH v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
W257 of 2001

RD NICHOLSON J
12 FEBRUARY 2002
PERTH

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY**

W257 of 2001

**BETWEEN: MARIJA BOZANICH
 APPLICANT**

**AND: MINISTER FOR IMMIGRATION & MULTICULTURAL
 AFFAIRS
 RESPONDENT**

**JUDGE: RD NICHOLSON J
DATE OF ORDER: 12 FEBRUARY 2002
WHERE MADE: PERTH**

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent's costs of the application.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT
REGISTRY**

W257 of 2001

**BETWEEN: MARIJA BOZANICH
 APPLICANT**

**AND: MINISTER FOR IMMIGRATION & MULTICULTURAL
 AFFAIRS
 RESPONDENT**

**JUDGE: RD NICHOLSON J
DATE: 12 FEBRUARY 2002
PLACE: PERTH**

REASONS FOR JUDGMENT

- 1 The applicant brings an application to review a decision of the Migration Review Tribunal (“the Tribunal”) given on 29 May 2001. The decision affirmed a decision by a delegate of the respondent refusing to the applicant an Extended Eligibility (Temporary) (Class TK subclass 820) spouse) visa (“820 spouse visa”). The application is brought pursuant to s 476 of the *Migration Act 1958* (Cth) (“the Act”).
- 2 The application for the 820 spouse visa was lodged with the Department of Immigration & Multicultural Affairs (“DIMA”) on 25 June 1998. It was supported by the applicant’s husband as her nominator.

Relevant legislative provisions

- 3 The Act and the Migration Regulations 1994 (“the Regulations”) provide for different classes of visa: s 31. The Regulations may prescribe criteria for a visa or visas of a specified class: s 31(3). Regulation 2.01 provides that for the purposes of s 31 of the Act, the prescribed classes of visas are such classes as are set out in the respective items of sch 1 to the Regulations and the classes of transitional (permanent) and transitional (temporary). Regulation 2.02 provides for provision of subclasses in sch 2. The criteria applicable to classes of visas are addressed in reg 2.03.

4 Schedule 1 makes provision for the extended eligibility (temporary)(Class TK) visa in item 1211 and for subclass 820.

5 Schedule 2 of the Regulations provides for the content of subclass 820 spouse visa. Relevantly, the Regulations provide as part of the primary criteria to be satisfied by at least one member of a family unit (see item 820.2) that the criteria to be satisfied at the time of the application are:

“820.211

(1) *The applicant:*

- (a) *is not the holder of a Subclass 771 (Transit) visa; and*
- (b) *meets the requirements of subclause (2), (3), (4), (5), (6), (7), (8) or (9).*

(2) *The applicant meets the requirements of this subclause if:*

- (a) *the applicant is the spouse of a person who:*
 - (i) *is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; and*
 - (ii) *is not prohibited by subclause (2B) from being a nominating spouse; and*
- (b) *[repealed]*
- (c) *the applicant is nominated by that Australian citizen, Australian permanent resident or eligible New Zealand citizen; and*
- (d) *in the case of an applicant who is not the holder of a substantive visa – either:*
 - (i) *the applicant:*
 - (A) *entered Australia as the holder of a Subclass 995 (Diplomatic) visa or as a special purpose visa holder who at the time of entry met the requirements of subclause (2A); and*
 - (B) *satisfies Schedule 3 criterion 3002; or*
 - (ii) *the applicant satisfies Schedule 3 criteria 3001, 3003 and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria.”*

Relevantly also item 820.22 provides the following criteria are to be satisfied at the time of decision:

“820.221

(1) *In the case of an applicant referred to in subclause 820.211(2), (3), (4), (5), (6), (7), (8) or (9), the applicant either:*

- (a) *continues to meet the requirements of the applicable subclause;*
or

(b) meets the requirements of subclause (2) or (3). ”

Tribunal’s findings

6 The Tribunal found the conclusion of the primary decision-maker that the applicant and her husband shared a “genuine committed relationship” both at the time of the application and at the time of the decision of the primary decision-maker, was supported by the evidence and the Tribunal agreed with it.

7 The Tribunal then stated that as the applicant was not the holder of a substantive visa at the time she lodged the 820 spouse visa application, her visitor visa having expired, she had to satisfy sch 3 criteria 3001, 3003 and 3004: subclause 820.211(2)(d)(ii).

8 The Tribunal first considered to the provisions of sch 3, criteria 3001 on the basis that if the applicant did not meet those criteria it was not necessary to assess against the provisions of sch 3, criteria 3003 and 3004 as it was a requirement that all three be met.

9 The provisions of sch 3, criteria 3001 considered by the Tribunal relevantly read:

“(1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)):

(2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:

(c) if the applicant:

(i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

(ii) entered Australia unlawfully on or after 1 September 1994; whichever is the later of:

(iii) the last day when the applicant held a substantive or criminal justice visa; or

(iv) the day when the applicant last entered Australia unlawfully. ”

The Tribunal found that the applicant could not meet the requirement prescribed under par (1) of 3001 read with par (2)(c)(i) because her visitor visa she last held had expired more than 28 days before the date on which she lodged her primary application.

10 The Tribunal then turned to consider – as required by 820.211(2)(d)(ii) – whether there were “compelling reasons” for not applying criteria 3001. The Tribunal accepted that the word “compelling” should be taken in its ordinary meaning denoting the use of force towards a

particular course of action, the circumstances surrounding which are usually involuntary and generated by a necessity.

11 The Tribunal noted it was common ground the spouse relationship on its own did not amount to a compelling reason otherwise it would have been provided for in the legislation.

12 The Tribunal then turned to the evidence. It recorded the evidence of the applicant that she was always under the impression her visitor visa to Australia was valid for a period of 12 months. Her evidence was she had not realised that she was in Australia unlawfully and conceded it was her fault for not checking her passport which had been held by her daughter-in-law (later estranged from her son) for safe-keeping. She maintained she had “done nothing wrong” and was allegedly advised by a DIMA officer that she “would have no problem getting a visa if she got married”.

13 The Tribunal also recorded:

“14. One day after the visit by a DIMA officer the Applicant moved in with Mr Bozanich. She told the Tribunal that she had intended to marry him before the expiry of her visitor visa in July 1998 anyway. The couple were married about a month later on 24 June 1998.”

14 The Tribunal found the evidence of Mr Bozanich to be consistent with that of his wife.

15 The Tribunal then reasoned as follows:

“16. The Tribunal has carefully considered the evidence to assess whether there are ‘compelling reasons’ for not applying Schedule 3 criteria 3001. The Tribunal does not find that being under the mistaken impression that she was allowed to stay for a period of twelve months amounts to a compelling reason, within the meaning discussed above. The Applicant also said that she had relied on her former daughter-in-law, whom she said was holding her passport, to monitor the validity period of her visa. Again there is nothing compelling in that action. There is no reason why the Applicant could have asked her son, daughter-in-law or her husband to check her passport, on which the relevant sticker clearly stated that she was ‘permitted to remain in Australia for 06 months from date of arrival’. As for her contention that she had relied on DIMA’s advice in relation to getting married and securing the relevant spouse visa, even if it was true and the Tribunal makes no finding in that regard, the Tribunal does not view it as a compelling reason for not applying the criteria in question. The Tribunal accepts that there will be a financial setback in the Applicant and her husband having to pay for her airfare back to Croatia and then back to Australia again should she be

granted the relevant visa to return. Having considered all the circumstances, whether singly or as a whole the Tribunal is unable to reach a finding of fact that there are compelling reasons for not applying the relevant Schedule 3 criteria.”

- 16 Having reached that view the Tribunal therefore found the applicant had failed to meet the criterion prescribed under subclause 820.211(2)(d)(ii) of the Regulations so that the application must necessarily fail. The Tribunal therefore affirmed the decision under review.

Grounds of review

- 17 The amended application relied on grounds (7) which either relied on errors of fact or alleged errors of law and fact. Opportunity was given to pro bono counsel for the applicant to make apparent to the Court the relevant paragraphs of s 476 of the Act relied upon in connection with each ground. They appear in what follows.
- 18 The general case for the applicant is that the Tribunal was in error of law in not finding there were compelling reasons for not applying the sch 3 criteria. This is because, firstly, it is said that compelling reasons are those which are of a strongly compassionate nature. Secondly, the factors referred to by the Tribunal had a compassionate character about them which should have been seen as strongly so. These were the factors referred to in par 16 of the Tribunal’s reasons, namely, a mistake on the part of the applicant as to the duration of her visa; her reliance on what she understood to be DIMA’s advice; and the impact on her family and her husband if she was required to leave Australia to make her visa application. Thirdly, there is the argument that the Tribunal misunderstood the evidence of her intention to marry as expressed in par 14 of the Tribunal’s reasons.

Grounds 1 and 7: Statement re intention to marry: s 476(1)(d) and (g)

- 19 This ground focuses on the statement by the Tribunal that the applicant “told the Tribunal that she had intended to marry [Mr Bozanich] before the expiry of her visitor visa in July 1998 anyway”. The first ground states this is in error of law because of the finding in par 16 that the Tribunal did not regard the applicant’s reliance on the advice of the DIMA officer as a compelling reason for not applying the sch 3 criteria.

20 Ground 7 also focuses on the same statement and contends there is no such evidence, alternatively, that the statement is found contrary to s 359A of the Act. This latter aspect will be dealt with in connection with ground 5 which placed reliance on the same section.

21 Before the Tribunal there was a file note dated 14 May 1998 recording that compliance officers visited the residence of the applicant and advised her she was currently unlawful since January 1998. It also records “we were informed that [the applicant] had intentions of marrying an Australian citizen prior to the expiry of her visa in July”. There was, therefore, evidence before the Tribunal to support the substance of the statement which it made concerning the applicant’s intentions. The fact the statement was made to the compliance officer and came before the Tribunal through the file note cannot assist in establishing, as required by s 476(1)(g), that there was no evidence to support the Tribunal’s finding. It was not significant whether the evidence was given directly to the Tribunal or to the Tribunal by the record of the compliance officer provided there was evidence before the Tribunal on which it could base its findings.

22 Furthermore, the issue of the statement of intention is not a matter which bore upon the Tribunal’s reasons on the issue of whether there were compelling reasons for not applying sch 3 criteria. Even if the statement of intention was somehow in error, it is not an error which would support remittal of the matter for reconsideration.

23 The alternative ground of improper exercise of the power is unsupported and cannot succeed.

Ground 2: improper exercise of power being an exercise in accordance with a rule or policy without regard to the merits

24 Here it is contended that the Tribunal erred in law (and in fact) due to the occurrence of 10 circumstances. It is said that these will support the application of s 476(1)(d) understood in terms of s 476(3)(c).

25 The 10 factors relied upon are as follows:

- “(1) *The applicant is unable to speak, read and write English.*
- (2) *The applicant held a return airline ticket which was valid for a period of twelve months from 15 July 1997.*

- (3) *The evidence showed that the applicant believed she was entitled to stay in Australia for a period of twelve months from 15 July 1997. See pars [13] and [14] of the reasons.*
- (4) *On or about 14 May 1998 a DIMA officer advised the applicant that she was an unlawful resident as her visitor's visa expired on 15 January 1998.*
- (5) *On or about 19 May 1998 the applicant was advised by a DIMA officer that if she married an Australian resident Luka Lenko Bozanich within 6 weeks she would be permitted to remain in Australia.*
- (6) *On 19 May 1998 the applicant signed a bridging visa application prepared by a DIMA officer.*
- (7) *In reliance upon the advice referred to in par [5] above the applicant incurred expense including \$25.00 for an Australian Federal Police Clearance, \$40.00 for a Croatian Police Clearance, \$200.00 or more for medical fees, and \$1,565.00 for a General Residence Visa, did not use her return ticket to Croatia and married Luka Lenko Bozanich on 24 June 1998 which she would not have done but for the advice referred to in par 5 above.*
- (8) *The applicant and Luka Lenko Bozanich have since 24 June 1998 been living together in a genuine and continuing relationship with a mutual commitment.*
- (9) *On 25 June 1998 the applicant applied for a general residence visa in accordance with the advice in par 5 above.*
- (10) *In the circumstances it would be unconscionable (inter alia in view of the facts referred to in par 4 above) for the respondent to depart from the representation referred to in par 5 above and contend that this does not constitute compelling reasons for the grant of an Extended Eligibility Visa or alternatively authority to remain in Australia by virtue of her expenditure and marriage to an Australian citizen Luka Lenko Bozanich in reliance on the representation."*

26 The issue of unconscionability arising in item (10) immediately above is addressed in ground 3.

27 Turning to the way in which the ground is pressed, it was argued for the applicant that advice sent to her by registered post from DIMA on 29 January 1999 showed there was a policy for the purposes of the exercise of the discretionary power in her case. That letter referred to her application to remain permanently in Australia on the basis of her marriage with an Australian citizen/permanent resident. It then referred to the fact that because she was not the holder of a substantive visa she had to satisfy additional criteria. It then stated:

"This requires that you meet one of the following two provisions:

- 1. a) You are not the holder of a substantive visa because of factors beyond your control; AND*

- b) *there are compelling reasons for granting the visa; AND*
 - c) *you have complied substantially with any conditions subject to which your last visa was granted*
2. *There exist compelling reasons in your case. Generally the circumstances for which compelling reasons are considered to exist are:*
- a) *there are Australian citizen children of the relationship, or*
 - b) *the applicant and nominator are already in a long-standing spouse relationship (taken to be a relationship which has existed for at least two years).*

Both you and your nominator are requested to present information as to why you consider there are compelling reasons exists [sic] in your case."

The applicant was invited to comment on the matter within a certain time limit.

28 I agree with the submission for the respondent that the contents of this letter do not identify a policy for the relevant alleged application of s 476(1)(d) read in conjunction with s 476(3)(c). There is, therefore, no evidence to support the ground that there was an improper exercise of power by the Tribunal because it acted in accordance with the rule or policy without regard to the merits of the particular case. Indeed, a reading of the Tribunal reasons shows it was, particularly in par 16, closely concerned with the merits of the particular case.

29 The argument for the applicant seems to have been that the Tribunal decision must have involved an improper exercise of the type relied upon because otherwise the Tribunal would have come to a different conclusion being one favouring the applicant. The foundations for that contention do not exist.

30 Furthermore, point 5 of the particulars of the ground is not one which forms a subject of a finding of fact by the Tribunal.

Ground 3: Equitable considerations

31 This ground alleges the Tribunal erred in law (and in fact) in finding that a rule of law or equity or the interests of justice could not constitute compelling reasons for not applying the sch 3 criteria. That aspect of the ground relies upon s 476(1)(e) as an error of law involving an incorrect application of the law to the facts.

32 Alternatively, the ground presses that the Tribunal's decision again involved an improper

exercise of power and relies on s 476(1)(d).

- 33 The ground is considered also in connection with particular 10 of ground 2 in relation to the claim of unconscionability for the respondent to depart from the representation referred to in point 5 of the particulars said to support ground 2.
- 34 The applicant's case for this ground relies on the contents of par 16 of the Tribunal's reasons, set out above.
- 35 The ground must fail because it relies on considerations which do not give rise to a ground of review under s 476(1) of the Act.
- 36 So far as the ground is sought to be supported by reference to evidence which was not before the Tribunal, that evidence cannot be relied upon to establish an error of law by the Tribunal.
- 37 In exercising its discretion the Tribunal had regard to the possibility the applicant had relied on DIMA's advice but, in the context of all relevant circumstances referred to in par 16 of its reasons, did not view that possibility as giving rise to a requisite compelling reason. There was nothing improper in that exercise of discretion.

Ground 4: Error of law in relation to affect on family unit

- 38 This ground relies upon s 476(1)(e) as an error of law in application and an improper exercise of power: s 476(1)(d). It alleges that there was error of law (and in fact) in failure by the Tribunal to consider reasons of a strongly compassionate or humanitarian nature (as set out in the particularisation of ground 2 and ground 6) that the separation of the applicant from her husband and her only son and granddaughter would have a severe and adverse affect on the established family unit.
- 39 In the Policy Guidelines in relation to the application of the 820 visa criteria it was stated:

"3.3.14 In assessing whether there are compelling reasons, officers are to take into account the circumstances which the Minister considers to be compelling. These circumstances, which were in the Explanatory Memorandum to Statutory Rules 1996 no. 75 which inserted this provision, are that

- *there are Australian-citizen children from the relationship; or*
- *the applicant and their nominator are already in a long-standing spouse relationship (taken to be a relationship which has existed for at least two years.)*

In these circumstances, it is considered that the hardship which could result in applying the Schedule 3 criteria is sufficiently compelling to justify not applying the criteria.”

It is submitted that this supports the need for the Tribunal to have considered the factors to which this ground is directed.

40 In par 16 of its reasons the Tribunal considered the financial setback to the applicant and her husband if she was required to leave Australia to be eligible to seek a visa to rejoin him in Australia. That was based on its consideration of his evidence in relation to which the Tribunal recorded:

“15. The evidence of Mr Bozanich was consistent with that of his wife. He told the Tribunal that if his wife was required to leave Australia, he will not accompany her but will sponsor her back to Australia. He said that ‘if she’s got to go she’s got to go’. However he said that it would be ‘difficult financially’ as he will have to pay for her return airfare.”

There was not evidence which required the Tribunal to consider the impact on the family unit now relied upon. There is no evidence there was any contention made on behalf of the applicant that the separation of her from her husband and her only son and granddaughter would have a severe and adverse effect on the established family unit.

41 Those issues are said, in particular, to arise from fresh evidence which should be adduced. This evidence, which may be generally described as medical evidence, is said to have been evidence which could have been available but which the applicant was not given the opportunity to produce. Furthermore, it is contended the Tribunal was aware of the applicant’s son and did not take into account his position.

42 The express terms of s 476(3)(d) and (e) make it apparent that taking into account an irrelevant consideration or failing to take a relevant consideration to account are not matters which can fall within the ground of review in s 476(1)(d) relating to an improper exercise of the power conferred by the Act or the Regulations. That aspect aside, however, in the reasons of the Full Court in *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR 1, it was recognised if a tribunal identifies a wrong issue, asks a wrong question,

ignores relevant material or relies on irrelevant material it may give rise to a ground of review falling within either s 476(1)(b), (c) or (e). In the case of s 476(1)(e), it may be that the Tribunal in acting in this way may “reveal that it has made an error in its understanding of applicable law or has failed to apply that law correctly to the facts it found”. In that case that ground could be made out. See reasons at 22, [84] and the reasons for judgment of McHugh, Gummow and Hayne JJ with which Gleeson CJ agreed.

43 However, here the case for the applicant is that new evidence not before the Tribunal on the occasion of the hearing leading to its decision might affect the result and lead to a different outcome on the merits. It cannot in that circumstance be said that the Tribunal identified a wrong issue, asked a wrong question, ignored relevant material or relied on irrelevant material. The evidence was simply not before the Tribunal. There was no relevant material of the type contended for before it to ignore or wrongly address.

44 Furthermore, it was not for the Tribunal to make the applicant’s case for her by searching out the fresh evidence now sought to be relied upon.

45 In relation to the alternative ground of an improper exercise of power, it has already been made apparent that the matters relied upon are excluded from consideration by s 476(3)(d) and (e). There is nothing to enliven this ground in this instance.

Ground 5 and 7: Procedural non-compliance

46 Turning firstly to ground 5: this ground relies upon s 476(1)(a). In its alternative formulation relating to an improper exercise of power it again relies on s 476(1)(d).

47 The procedural non-compliances particularised in the ground are preceded by the substance of the ground which is that there was non-compliance with certain procedures contrary to s 359A of the Act.

48 Section 359A, which is in terms similar to s 424A as applicable to a Refugee Review Tribunal, reads:

“(1) Subject to subsection (2), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers

- appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
- (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and*
 - (c) invite the applicant to comment on it.*
- (2) Subject to subsection (3), the invitation must be given to the applicant by one of the methods specified in section 379A.*
- (3) Subsection (2) does not apply if the applicant is in immigration detention because of:*
- (a) a decision to refuse to grant him or her a bridging visa; or*
 - (b) a decision to cancel his or her bridging visa.*
- (4) This section does not apply to information:*
- (a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or*
 - (b) that the applicant gave for the purpose of the application; or*
 - (c) that is non-disclosable information.”*

49 In *Minister for Immigration & Multicultural Affairs v Al Shamry* [2001] FCA 919 at [39] by Merkel J:

“By enacting s 424A and its counterparts elsewhere in the Act, the legislature has accepted that fairness dictates that an opportunity must be provided to applicants for visas or for review to respond to, or deal with, the adverse information.”

Section 359A is one such counterpart.

50 The particularisation of the ground relied on the following:

“The Tribunal failed to:

- 1. give the applicant particulars of the contents of the DIMA file that the Tribunal considered would be part of the reason for affirming the decision under review.*
- 2. Ensure that the applicant understood why the contents of the DIMA file were relevant to the review.*
- 3. Invite the applicant to comment on the contents of the DIMA file particularly when the applicant was unable to speak, read or write English and had by her assistant on 24 September 1999 requested access to information held on the DIMA file and paid a fee of \$30.00 for the same which was acknowledged by letter dated 28 September 1999 from the DIMA.”*

51 The obligation arising under s 359A(1) to provide the particulars must be given where the Tribunal considers they “would be the reason, or part of the reason, for affirming the decision that is under review”. There is nothing to suggest the DIMA file fell into this characterisation. There is , therefore, no foundation upon which s 359A could operate.

52 Turning now to ground 7, that firstly contends for an error in fact in the Tribunal’s description of the evidence given by the applicant of her intention to marry. Errors of fact lie beyond the jurisdiction of this Court.

53 In the alternative portion of the ground, it is alleged:

“Contrary to s 359A of the Act the applicant:

- 1. was not given such information.*
- 2. did not understand its relevance.*
- 3. was not given an opportunity to comment on the evidence given by Mr Bozanich which was given in English and was not interpreted for her.”*

54 There is a preliminary question whether the evidence of the applicant’s husband was part of the reason for the Tribunal affirming the decision under review. It is not referred to in par [16] of the Tribunal’s reasons. However, in that paragraph the Tribunal relies on its consideration of “all the circumstances”. That arguably should be understood to include par [15] set out above.

55 However, there remains the question whether the contents of par [15] were relied upon by the Tribunal in reaching the decision that there were not compelling reasons for not applying the relevant Sch 3 criteria and so affirming the decision under review. The evidence of the applicant’s husband referred to in par [15] did not address whether there were compelling reasons or not. Rather it addressed the position which would arise in the event the Tribunal found there were no compelling reasons and so was required to affirm the decision under review. It could not therefore have been part of the reasons for that decision. Consequently s 359A could not have had application in relation to par [15].

Ground 6: Error of law in relation to applicant’s lack of knowledge of the expiry of her visa

56 The next ground contends that the Tribunal erred in law (and in fact) in finding the applicant's lack of knowledge of the expiry of her visa could not amount to a compelling reason. This is said to be supported by particulars that this was so because the evidence established:

- “1. the applicant could not speak, read or write English.
- 2 the applicant's sister arranged the applicant's visa in Vienna without the attendance of the applicant who resided on an island in Croatia.
3. the applicant was told by telephone by the Australian Consular officials in Vienna that she had a visa for 12 months.
4. the applicant held a return airline ticket which was valid for a period of twelve months from 15 July 1997.
5. the applicant's passport and airline ticket were held by her daughter-in-law in Australia.
6. the Applicant did not look at her visa.
7. the applicant's evidence was at all times that she had done nothing wrong.”

57 This ground is said to be supported by reference to, firstly, s 476(1)(d). This has been previously considered in these reasons and there is nothing to suggest the existence of an improper exercise and to enliven the paragraph.

58 Secondly, reliance is placed on s 476(1)(e). There is no room here for any contention the Tribunal ignored matters or failed to take them into account as suggested is possible by *Yusuf*. There was no misinterpretation or misapplication of the law.

59 What the applicant's ground seeks (impermissibly) to do is to have this Court re-enter into the making of the finding of evidence made by the Tribunal. That matter lies in its province and it was a question of fact for it to determine whether the applicant's lack of knowledge of the expiry of her visa could amount to a compelling reason or not.

60 An alternative in the ground provides the Tribunal erred in law (or in fact) in finding the applicant was at fault for not checking her passport. That does not sustain the application of any of the permitted grounds of review. It was a finding of fact lying peculiarly within in the province of the Tribunal.

Ground 8: Error of law and procedural non-compliance in relation to presence of an assistant

61 By agreement an eighth ground was added. It raises the issue whether procedures required by

the Act in connection with the making of the decision were not observed in that the applicant was denied an opportunity to have an assistant present to assist her while appearing before the Tribunal in accordance with s 366A of the Act.

62 That section reads:

“366A

*(1) The applicant is entitled, while appearing before the Tribunal, to have another person (the **assistant**) present to assist him or her.*

(2) The assistant is not entitled to present arguments to the Tribunal, or to address the Tribunal, unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so.

(3) Except as provided in this section, the applicant is not entitled, while appearing before the Tribunal, to be represented by another person.

(4) This section does not affect the entitlement of the applicant to engage a person to assist or represent him or her otherwise than while appearing before the Tribunal.”

63 It is apparent from the terms of s 366A that it does not impose an obligation on the Tribunal itself to provide an assistant to carry out the functions permitted by the section. Rather, it is a section which enables the applicant by way of entitlement, while appearing before the Tribunal, to have another person present to assist him or her in the permitted senses.

64 There is no evidence here of the applicant having asked for another person to be present to assist her in this capacity. There is, therefore, no foundation upon which the section could have operated. Consequently, there is no procedural failure that can arise in relation to it.

65 In s 5 of the applicant’s application for review to the Tribunal she provided the details of the representative assisting her in respect of the application. He was identified as the same person who appeared for her as pro bono counsel on this application. In the course of his submissions counsel for the applicant submitted that because of his non attendance as representative at the Tribunal hearing, evidence of hardship relevant to the decision by the Tribunal of whether the reasons for non application of sch 3 requirements were compelling were not put before the Tribunal. There is no evidentiary foundation for that contention.

Conclusion

66 For the above reasons I consider none of the grounds relied upon give rise to a proper basis upon which this Court could review the decision of the Tribunal. Accordingly, the application should be dismissed.

I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice RD Nicholson .

Associate:

Dated: 12 February 2002

Pro Bono Counsel for the Applicant:	Mr B Wheatley
Counsel for the Respondent:	Mr AA Jenshel
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	6 December 2001
Date of Judgment:	12 February 2002